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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ROBERT PACKIN, Plaintiff and Respondent, v. ASTRA USA, INC. et al., Defendants and Appellants.	G023345 (Super. Ct. No. 787168) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Richard O. Frazee, Judge. Affirmed.

Hill & Barlow, Patrick J. Bannon, Littler Mendelson, W. Joseph Strapp, Douglas Wickham, Tal T. Peles, Seyfarth, Shaw, Fairweather & Gearldson and David D. Kadue for Defendants and Appellants.

Gerald N. Shelley for Plaintiff and Respondent.

* * *

Robert Packin filed this action against Astra USA, Inc. for termination of his employment in violation of the Fair Housing and Employment Act (FEHA) and against Astra and fellow employees Elizabeth Mandl, Donna Matas, and Cheryl Bondy for defamation. Astra and the individual defendants filed a motion to stay this action in favor of arbitration pursuant to a written arbitration agreement. The trial court denied the motion, finding the arbitration agreement unconscionable and unenforceable. All defendants appeal, and we affirm.

FACTS

Packin was employed in 1991 as a district sales manager by Astra, a pharmaceutical company headquartered in Massachusetts. In 1994, Astra issued a memorandum to all employees informing them that it had established an arbitration procedure to resolve employment disputes "in a timely manner at significantly lower costs for all." Employees were assured that the procedure would be fair and impartial and that "arbitrators will apply and use the same laws to decide a case that a judge or jury would have used." All nonprobationary employees were required to sign the arbitration agreement or they would not receive "any future allocations to the Astra Profit Sharing Program."

Packin declared he first learned about the arbitration agreement during a company conference on the East coast, when "Astra representatives got up and discussed the benefits of this agreement for employees." He was concerned "about possibly being the only person in the room who did not sign," because "[a]t Astra, there was a continual turnover of people who complained and then were fired." At that time, Packin needed nine months for his interest in the company pension plan to vest and did not want to jeopardize his job. "That vesting had a value of between $40,000 to $50,000 to me." Packin signed the agreement.

Two years later, Packin's employment was terminated. Astra claimed the termination was due to Packin's acts of sexual harassment, but he believed it was because of his age and his complaints about age discrimination in the company. He filed this action against Astra asserting claims under FEHA for age discrimination and retaliation, and against Astra and the individual defendants for defamation; he also sought a declaration that the arbitration agreement was unconscionable and unenforceable.

The arbitration agreement provides that an employee must submit a claim to arbitration "not later than 180 days after the date the employee learned or should have learned of the facts forming the basis of the claim(s)." If the parties are unable to agree on an arbitrator, Astra will submit the demand to the American Arbitration Association in Boston, Massachusetts "whose procedures will be used only to select an arbitrator." The arbitrator must apply Massachusetts law and is limited to determining whether Astra's actions were discriminatory or tortious; the arbitrator has no authority to decide whether the type of employee discipline used by Astra was appropriate. The arbitrator's choice of awards to the employee is limited to reinstatement; "full or partial back pay, and reimbursement for lost fringe benefits, without interest, reduced by interim earnings, benefits received, and amounts that could have been received with reasonable diligence"; up to 12 months of front pay, "if reinstatement is not practical or reasonable"; and punitive damages up to 12 months pay. There is no limitation on damages if the award is in favor of Astra. The costs of the arbitration will be shared equally by the employee and the company, "either party has the right to have the hearing transcribed by a certified court reporter at its own expense," and each party will bear its own attorney's fees.

After Packin's complaint was filed, Astra offered to modify the arbitration agreement so as to (1) remove the limitation on damages ("Mr. Packin will be entitled to recover any relief permissible under applicable law"); (2) allow the arbitrator's decision to be submitted to the Equal Employment Opportunity Commission; and (3) pay the full

cost of the arbitration, excluding attorney's fees. Packin declined the offer, and Astra filed its motion to stay the litigation.

DISCUSSION

Astra first contends whether the arbitration agreement is unconscionable is a question for the arbitrator, not the trial court. But the trial court must determine whether an agreement to arbitrate exists before compelling arbitration. (*Stirlen v. Supercuts, Inc.* (1997) 51 Cal.App.4th 1519, 1527.) Because an agreement to arbitrate can be invalidated "upon such grounds as exist for the revocation of any contract" (Code Civ. Proc., § 1281), and because unconscionability is a defense to the enforcement of contracts in general (Civ. Code, § 1670.5), it is a question for the trial court.

Astra next contends its arbitration agreement is not unconscionable. We disagree. The FEHA establishes statutory rights designed "to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgement on account of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, sex, age, or sexual orientation." (Gov. Code, § 12920.) This public policy against employment discrimination "inures to the benefit of the public at large rather than to a particular employer or employee"; accordingly, these rights cannot be waived. (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 100-101.)

In *Armendariz*, the Supreme Court formulated minimum requirements for "the validity of a mandatory employment arbitration agreement, i.e., an agreement by an employee to arbitrate wrongful termination or employment discrimination claims rather than filing suit in court, which an employer imposes on a prospective or current employee as a condition of employment." (*Armendariz, supra*, 24 Cal.4th at p. 90.) Astra argues the *Armendariz* rules do not apply here because arbitration was not a condition of Packin's continued employment; he could have refused to sign and forfeited

future allocations to the profit sharing plan. We fail to see the distinction. Employee benefits are an important part of the compensation package, and the loss of profit sharing allocations would be, in effect, a reduction in compensation. Forcing an employee to accept a reduction in compensation in exchange for the right to a judicial forum is as offensive as imposing arbitration as a condition of employment. Accordingly, we assess the validity of Astra's arbitration agreement under the principles of *Armendariz.*

Armendariz held while "an arbitration agreement cannot be made to serve as a vehicle for the waiver of statutory rights created by the FEHA," it will be enforceable if it meets certain minimum requirements which permit an employee to vindicate his or her statutory rights. "Such an arbitration agreement is lawful if it '(1) provides for neutral arbitrators, (2) provides for more than minimal discovery, (3) requires a written award, (4) provides for all of the types of relief that would otherwise be available in court, and (5) does not require employees to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum.'" (*Armendariz*., *supra*, 24 Cal.4th at p. 102.)

The agreement here fails to meet the minimum requirements in two categories. First, the agreement limits the employee's recovery of attorney fees and punitive damages, which are available to a prevailing plaintiff under the FEHA. "The principle that an arbitration agreement may not limit statutorily imposed remedies such as punitive damages and attorney fees appears to be undisputed." (*Armendariz, supra*, 24 Cal.4th at p. 103.) Neither an employee's at-will status nor the employer's disciplinary methods can be challenged under the agreement, and the arbitrator is restricted to specific remedies. Furthermore, the agreement mandates the application of either the Federal Arbitration Act or Massachusetts law, thus depriving an employee of the rights and protections provided by California.

Second, the agreement requires the employee to shoulder half of the fees associated with the arbitration, resulting in forum costs greater than the usual litigation costs. The Supreme Court determined this requirement could deter employees from bringing FEHA claims and is thus impermissible. "We therefore hold that a mandatory employment arbitration agreement that contains within its scope the arbitration of FEHA claims impliedly obliges the employer to pay all types of costs that are unique to arbitration." (*Armendariz., supra*, 24 Cal.4th at p. 113.)

Astra's arbitration agreement not only fails to meet the minimum standards for arbitration of FEHA claims as set forth in *Armendariz*, it also fails the more general contractual validity test: unconscionability. (Civ. Code, § 1670.5; Code Civ. Proc., § 1281.) An unconscionable agreement typically is one of adhesion, i.e., "a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." (*Neal v. State Farm Ins. Cos*. (1961) 188 Cal.App.2d 690, 694.) If an adhesion contract is contrary to the expectations of the weaker party or oppressive as applied to him, the courts will refuse to enforce it against him. (See *A & M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 484.)

The concept of unconscionability includes both procedural and substantive elements, both of which are generally present to some degree. The procedural element involves the absence of meaningful choice due to inequality in bargaining power or hidden terms. (See *Kinney v. United HealthCare Services, Inc.* (1999) 70 Cal.App.4th 1322, 1329.) The substantive element focuses on the terms of the agreement and whether they are unjustifiably one-sided and unreasonably harsh. (See *Stirlen v. Supercuts, Inc.* (1997) 51 Cal.App.4th 1519, 1532.) The two elements work together in a sliding scale relationship. "[T]he more substantively oppressive the contract term, the

less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." (*Armendariz*, *supra*, 24 Cal.4th at p. 114.)

The agreement here is clearly an adhesion contract; Packin had only the choice to sign it or forfeit his right to participate in profit-sharing. And the consequences of the agreement were, if not actually hidden from the employees, substantially obscured by the way it was presented to them. The explanatory memorandum distributed with the agreement touted arbitration as quicker and less expensive than litigation and every bit as fair. But "[w]hile arbitration may have its advantages in terms of greater expedition, informality, and lower cost, it also has, from the employee's point of view, potential disadvantages: waiver of a right to a jury trial, limited discovery, and limited judicial review. Various studies show that arbitration is advantageous to employers not only because it reduces the costs of litigation, but also because it reduces the size of the award that an employee is likely to get, particularly if the employer is a 'repeat player' in the arbitration system." (*Armendariz, supra*, 24 Cal.4th at p. 115.)

The agreement is also substantively unconscionable because it does not contain the "modicum of bilaterality" required by *Armendariz*. Although the agreement does not expressly authorize the litigation of Astra's claims against an employee, it speaks only to an employee's claim ("Astra USA, Inc. has established a formal employment dispute resolution arbitration procedure designed to provide all employees an exclusive, final and binding means of recourse to resolve legal issues arising out of their employment or termination of employment with Astra without resorting to litigation in the courts"). Only the employee is limited in the time to present a claim and the recovery of damages, and only Astra can modify the agreement. "If the arbitration system established by the employer is indeed fair, then the employer as well as the employee should be willing to submit claims to arbitration. Without reasonable

justification for this lack of mutuality, arbitration appears less as a forum for neutral dispute resolution and more as a means of maximizing employer advantage. Arbitration was not intended for this purpose." (*Armendariz*, *supra*, 24 Cal.4th at p. 118.)

Astra argues its proffered modifications to the arbitration agreement render it unobjectionable. But Astra offered only to remove the damages limitation and pay the arbitration fees. It did not waive the application of Massachusetts law, it expressly exempts attorney's fees from its offer, and it does not mention the cost of the reporter's transcript. Furthermore, it does not remove the unconscionable one-sidedness that permeates the agreement. "[W]hether an employer is willing, now that the employment relationship has ended, to allow the arbitration provision to be mutually applicable, or to encompass the full range of remedies, does not change the fact that the arbitration agreement as written is unconscionable and contrary to public policy. Such a willingness "can be seen, at most, as an offer to modify the contract; and offer that was never accepted. No existing rule of contract law permits a party to resuscitate a legally defective contract merely by offering to change it." (*Stirlen v. Supercuts*, *supra*, 51 Cal.App.4th at pp. 1535-1536.)[1]

Neither can the agreement be salvaged by severing the unconscionable provisions, as Astra suggests. "Because there is no single provision a court can strike or restrict in order to remove the unconscionable taint from the agreement," the entire agreement must fail. (*Armendariz*, *supra*, 24 Cal.4th at pp. 124-125.)

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[1] Astra argues its modification was effective without Packin's consent because it had the right to modify. But that right was restricted to "December 31st of any year upon 30 days notice to employees . . . ." The letter offering to modify was written in January, after Packin had been terminated and litigation had commenced. There was no notice to employees, which presumably would allow them to change their position, i.e., opt out of the profit sharing plan for the next calendar year, in light of the modification.

DISPOSITION

The order denying the motion to stay this action is affirmed. Respondent is entitled to costs on appeal.

SILLS, P. J.

WE CONCUR:

RYLAARSDAM, J.

BEDSWORTH, J.